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Before the
Federal Communications Commission
Washington, D.C.

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Promotion of Competitive Networks in Local Telecommunications Markets	)	
	)	WT Docket No. 99-217
Wireless Communications Association International, Inc., Petition for Rulemaking to Amend Section 1.4000 of the Commission's Rules to Preempt Restrictions on Subscriber Premises Reception or Transmission Antennas Designed to Provide Fixed Wireless Services	)	
	)	
Cellular Telecommunications Industry Association Petition for Rulemaking and Amendment of the Commission's Rules to Preempt State and Local Imposition of Discriminatory and/or Excessive Taxes and Assessments	)	CC Docket No. 96-98
	)	
Implementation of the Local Competition Provisions of the Telecommunications Act of 1996	)	

COMMENTS OF GST TELECOM CALIFORNIA, INC.

GST Telecom California, Inc. ("GSTC"), by its undersigned counsel, hereby submits these comments in response to the Commission's Notice of Inquiry in the captioned matter.[1]

[1] *In the Matter of Promotion of Competitive Networks in Local Telecommunications Markets*, FCC 99-141, WT Docket No. 99-217, CC Docket No. 96-98 (rel. July 7, 1999), as supplemented by *Order Extending Pleading Cycle* (rel. August 6, 1999).

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I. INTRODUCTION AND SUMMARY

GSTC is a wholly-owned indirect subsidiary of GST Telecom, Inc. ("GST"). GST and its subsidiaries are competitive carriers in both the local and inter-exchange markets. GSTC holds a Certificate of Public Convenience and Necessity ("CPCN") issued by the California Public Utilities Commission ("CPUC").[2] The purpose of filing these comments is to relay the frustrating and disappointing experiences that competitive local exchange carriers ("CLECs") such as GSTC face on an ongoing basis in their struggle to install telecommunications facilities in municipal rights-of-way.

GSTC's experiences in California are illustrative of the unnecessary, wasteful and potentially competition killing delays and expenses faced by CLECs seeking to enter markets in California, and clearly show that the Telecommunications Act of 1996 (the "1996 Act"),[3] has yet to filter down to the municipal level--where it must be enforced if it is to be effective. A century of California statutory and case law[4] has clearly confined the authority of cities and counties in

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[2] California Public Utilities Commission, Decision Nos. D95-04-058, D96-02-072, D95-12-057, December 20, 1995.

[3] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, *codified at* 47 U.S.C. §§ 151 *et seq.* ("1996 Act"). The 1996 Act amended the Communications Act of 1934.

[4] In 1905, the California state legislature amended §536 of the Civil Code (now California Public Utilities Code § 7901) to incorporate telephone lines. *See* note 37 *infra*. *See also, Pacific Tel & Tel. Co. v. City and County of San Francisco*, (App. 1 Dist. 1961) 17 Cal. Rptr. 687, 197 Cal. App.2d 133 (1959) (holding that § 7901 constitutes a *"continuing offer"* which is extended to telephone companies such as GSTC. Once the offer is accepted, by construction and maintenance of its lines, the telephone company receives a statewide franchise to use the public rights of way for prescribed purposes without requiring the same grant by a municipality. Additional case law characterizes the telephone corporation's acceptance of the franchise as a *"binding contract"* between the state and the company which cannot even be impaired by later

California to regulate the use of public rights-of-way by telephone companies. Municipalities may only exercise their police powers to regulate the time, manner and place regarding occupation of their rights-of-way,[5] and may not charge telephone companies a franchise fee for such use of those rights-of-way, or for engaging in the business of providing telephone services.[6] The process of obtaining municipal licenses should be a routine exercise for the telecommunications company consisting of nothing more than providing basic identifying information and proof of reasonable insurance coverage and agreeing to abide by generally applicable rules governing use of the public rights-of-way.

Despite this well-settled law, municipalities in California regularly use their authority to regulate time, manner, and place as a mechanism to commit "fibermail"-- the process whereby a municipality abuses and leverages its authority over time, manner, and place by slow-rolling the licensing process, using disparate permit terms, or exerting other inequitable treatment in order to extract free fiber, conduit, or other illegal compensation in return for access to municipal rights-of-way for installation of telecommunication facilities. Because the incumbent LEC has its transmission facilities in place, generally without most of the onerous obligations demanded of

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acts of the state legislature. In essence, the statewide franchise is paramount, authorizing the telephone company to construct its telephone system and offer service without paying any additional franchise fees to cities and counties within the state. *County of Los Angeles v. Southern California Tel. Co.*, 32 Cal.2d 378, 196 P.2d 773 (1948)).

[5] California Public Utilities Code § 7901.1 (1999) provides in pertinent part that, "municipalities shall have the right to exercise reasonable control as to the time, place and manner in which roads, highways, and waterways are accessed."

[6] *See* note 4 *supra* and notes 37-42 *infra.*

CLECs, this process discriminates in favor of the incumbent LEC and is inherently anti-competitive.

The discriminatory treatment of CLECs in California by the use of municipal fibermail acts to dissipate GSTC's resources,[7] weaken investor confidence,[8] and erode GSTC's competitive potential. At some point such a protracted, balkanized process for entering the market becomes so onerous that the CLEC must choose between delay that effectively stifles its business plan or capitulation to illegal demands that undermine its long-term competitive position. Clearly, such disparate and discriminatory treatment of CLECs in California creates a barrier to entry within the meaning of Section 253 of the 1996 Act[9]--thus violating the heart and soul of Congress' intent, and the Federal Communications Commission's mission, to create and foster a competitive telecommunications industry that would provide nation-wide leading-edge technology to all Americans.[10]

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[7] In addition to the valuable resources GSTC has been required to give to municipalities, the negotiating, corresponding, and attending various meetings with a host of municipalities costs GSTC a great deal in attorney fees, employee time, and administrative expenses.

[8] *See* note 18 *infra.*

[9] 47 U.S.C. §253.

[10] S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. At I (1996) (1996 Conference Report). *See also* Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, *First Report and Order,* 11 FCC Rcd. 15499, 15505 ¶ 1 (1996) (noting that the 1996 Act "fundamentally change[d] telecommunications regulation" by replacing protection of monopolies with encouragement of efficient competition) (*Local Competition First Report and Order), aff'd in part and vacated in part sub nom.* Competitive Telecommunications Ass'n v. FCC, 117 F.3d 1068 (8th Cir. 1997), *aff'd in part and vacated in part sub nom.* Iowa Utils. Bd. V. FCC, 120 F.3d 753 (8th Cir.1997), *aff'd in part, rev'd in part, and remanded sub nom.* AT&T Corp. v. Iowa Utils. Bd., 119 S. Ct.

II. BACKGROUND FACTS

As part of its effort to expand its regional network and close the competitive gap between incumbent local exchange carriers ("ILECs") and CLECs such as GSTC, GSTC is attempting to construct a telecommunications network that spans the State of California.[11] However, GSTC's goals of a statewide, leading-edge network have time and again been placed in jeopardy or nearly thwarted by the inequitable demands of local municipalities. The incessant and exhausting battle that GSTC and other similarly situated companies must wage[12] merely to obtain timely permit issuance, without being forced to pay compensation or agree to disparate contract terms, drains the resources of the very companies the 1996 Act intended to be the catalysts of competition.[13]

Although GSTC has previously been required to waive statutory rights,[14] or to provide an indefeasible right of use for fiber[15] as a condition of permit issuance, GSTC has determined that

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721 (1999) (*Iowa Utilities Board), Order on Reconsideration,* 11 FCC Rcd. 13042 (1996), *Second Order on Reconsideration,* 11 FCC Rcd. 19738 (1996), *Third Order on Reconsideration and Further Notice of Proposed Rulemaking,* 12 FCC Rcd. 12460 (1997), *appeals docketed, Second Further Notice of Proposed Rulemaking, FCC 99-70* (rel. Apr. 16, 1999) (*UNE Further NPRM).*

[11] Carriers such as GSTC have been granted by the State legislature a statewide right to use public rights-of-way under §7901, California Public Utilities Code, which will be discussed in greater detail below. *See* notes 37-42 *infra* and accompanying text.

[12] Level 3 Communications, L.L.C. ("LVL3") and Worldwide Fiber Inc. ("WFI") have both had similar experiences in California. Telephone conversations with Anita Taff-Rice, WFI attorney, and John Freeman, LVL3 attorney.

[13] *See* note 10 *supra.*

[14] A number of California cities have required GSTC to, among other things: (a) waive its right to neutral venue under California Civil Code § 394 (1999) and (b) indemnify the City for its own negligence (*see Tunkl v. Regents of the University of California*, 60 Cal.2d 92 (1963))

it can not afford to undermine its long-term competitive position by agreeing to the inequitable and excessive demands of every municipality. Thus, when GSTC was confronted with the demands of the "Regional Telecommunications Consortium"[16] ("Consortium"), a group of twelve (12) municipalities in Southern California,[17] GSTC refused to capitulate. The consequences of GSTC's decision to resist the demands of the Consortium is likely of great concern to the FCC. It certainly is of great concern to the shareholders of GST, who have seen

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(holding that when a number of indicators are present, a forced waiver of a public entity's tort liability violates public policy).

[15] GSTC, as a condition of placing telecommunications 20-year facilities in the City of Concord, was forced to agree to allow the City to purchase a 20-year IRU for three fibers for the pittance of $2,500, to indemnify the City for any and all claims by third parties for service interruptions, and to refrain from initiating any federal or state complaint, action, or proceeding of any kind.

[16] Lori D. Panzino, Franchise Analyst for San Bernardino County, and one of the principal agents of the Consortium, refers to "the consortium" in her May 12, 1999, letter to Tim Taylor, Sr. V.P. Engineering and Operations for GST Telecom; Steven J. Nelson, Deputy City Attorney of the City of Escondido, in a June 1, 1999, letter to GST General Counsel, J. Jeffrey Mayhook, refers to the group as "the Regional Telecommunications Consortium."

[17] The Consortium, according to its own admission, is not a de jure legal entity, but rather a de facto collection of municipalities interested in exploring ways to obtain compensation from GSTC, WFI, and LVL3. Although the Consortium's present status is unknown to GSTC, it was originally comprised of the Counties of Riverside and San Bernardino, and the Cities of Corona, Norco, Murietta, Temecula, Lake Elsinore, Escondido, and Poway. While never officially joining, the County of San Diego and the cities of San Diego and Ontario initially refused to even discuss the issuance of GSTC's permits until the Consortium appeared to have dropped its formal request for compensation.

the value of their investment decrease significantly while Wall Street analysts lament the delays the company has experienced in implementing its business plan.[18]

GSTC first learned of the Consortium in April 1999. GST had previously signed agreements with two other telecommunications companies, WFI (formerly Pacific Fiber Link) and LVL3, wherein GSTC would construct a long-haul route in Southern California. The purpose of GSTC's project is to provide GSTC long-haul facilities--necessary both as a revenue source to GSTC, and to provide the backbone necessary eventually to connect GSTC's local networks, without which it would be hard-pressed to compete against the local incumbent carriers. Under the terms of the agreement with LVL3 and WFI, GSTC, as the project's originator, would be the lead company in charge of constructing the route. GSTC is constructing six (6) conduits from Ontario to Corona, California, and eighteen (18) conduits from Corona to San Diego, California. GSTC is obligated under the agreement to transfer to WFI three (3) conduits on the Ontario to San Diego route and to LVL3 twelve (12) conduits from Corona to San Diego. GSTC intends to retain for its own use three (3) conduits from Ontario to San Diego.

In May 1999, in accordance with its obligations, GSTC attempted to file permit applications with the various cities and counties where the conduits were to be located.

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[18] GSTC, like many other CLECs, is under extreme pressure to install facilities as quickly as possible. GSTC's stock has recently fallen to half its former value due in part to news that GSTC's anticipated construction revenue was late because of permitting delays. *See* Warburg Dillon Read LLC, Linda B. Meltzer, *"GST Telecommunications, Inc. Reducing Estimates, Reducing Price Target,* September 21, 1999, "reduced guidance for 3Q99 after yesterday's close, with most impact coming from delay of recognizing construction revenue with several factors impacting core telecom..."; *see also* Deutsche Banc, Alex Brown, *GST Telecommunications: Lowering Estimates,* September 21, 1999, "the largest contributor to this reduction is the company's facilities sales (construction revenue) business..."

However, GSTC was informed by a number of cities and counties along the route that GSTC's permit applications would not be accepted[19] until the recently formed Consortium had finalized a "regional permit process" for the installation of telecommunications facilities. Within a few weeks, GSTC discovered that every municipality on the Ontario to San Diego route had either joined the Consortium or was contemplating joining.

After learning of the Consortium and its goal of creating a regional permit process, GSTC met with the Consortium on April 28, 1999, in an attempt to ascertain the nature of the Consortium's issues and to provide any necessary information about GSTC's project that may alleviate the Consortium's concerns. GSTC was extremely disappointed to discover that the Consortium was actually organized for the more subversive purpose of determining how the municipalities could increase their individual regulation of telephone companies and extract compensation from their use of municipal rights-of-way. According to GSTC's notes from the meeting of April 28, 1999, the Consortium demanded a host of information unrelated to the municipalities' right to manage time, manner, and place for use of public rights-of-way[20]--

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[19] A number of municipalities, including the County of Riverside, and the Cities of Temecula, Norco, and Poway, originally refused to accept GSTC's permit application, insisting that GSTC deal directly with the Consortium.

[20] The Consortium requested the following information: (1) a complete financial report of every company that will be installing conduits and/or optical fiber in the Counties' rights-of-way, including GSTC; (2) a long-term business plan from GSTC's parent, GST Telecom, Inc., to assess its business objectives; (3) a customer list that includes every customer of GSTC and GST Telecom, Inc. including its affiliates and subsidiaries whether they sell services in California or not; (4) a description from every company that will be installing conduits and/or optical fiber in the Counties' rights-of-way regarding the intended use of the conduits, including any vacant ducts; (5) a list of any subsequent purchasers of all or part of the conduit or optical fiber; and (6)

information not previously requested from any ILEC. Additionally, the Consortium threatened to delay GSTC's permits in the event GSTC did not agree to provide compensation to the various municipalities for use of the rights-of-way[21]--a demand never placed upon the regional ILECs.

Although the Consortium, through the Counties of San Bernardino and Riverside, later denied that its sole purpose was to address issues related to GSTC, the Consortium's actions present an appearance to the contrary.[22] The Consortium's true objectives became apparent at a June 18, 1999, meeting attended by GSTC,[23] the Counties of Riverside and San Bernardino, and

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a complete route map of all of GSTC's facilities, including those outside of County and State boundaries. Additionally, in the Meeting of April 28, 1999, the Consortium, through the Counties of Riverside and San Bernardino, requested that GSTC not speak directly with any of the cities they were planning construction through, and explained that if GSTC came in with a "big hammer" and forced the issue, GSTC's construction would be held up with "every question and option possible."

[21] The Consortium's representatives from San Bernardino and Riverside Counties stated that it was the Consortium's right to collect franchise fees based upon the gross revenues generated from any entity's facilities in the Counties' rights-of-way, notwithstanding current state law prohibiting such practices. Moreover, the Counties advised GSTC that they had a copy of a franchise agreement between GST Telecom Oregon, Inc., and the City of Portland, and that the Consortium would expect GSTC to agree to the same terms and conditions, including franchise fees, despite the fact that Oregon statutory law expressly authorizes such agreements while California's laws do not. Further, the Consortium informed GSTC that GTE California had given the City of Irvine a conduit in connection with an encroachment permit, which meant, according to the Consortium, that it was now at liberty to require similar compensation as a condition of issuing GSTC's permits. Finally, and perhaps of most significant, GSTC was informed by the Consortium that its permit applications would be delayed until it agreed to all of the above-mentioned conditions.

[22] Despite the Consortium's contention that it was not organized to specifically deal with GSTC's route in Southern California, the Consortium only consisted of those cities and counties along GSTC's route.

[23] LVL 3 and WFI were also in attendance.

the Cities of Escondido, Lake Elsinore, Ontario and Poway, along with a private law firm that had been retained by the Consortium members. The staff employees of the Consortium members present, in return for GSTC agreeing to certain demands, offered to recommend to their elected officials that the government entities would (a) waive any claim to collect franchise fees for GSTC's use of public rights-of-way and (b) expedite the processing of GSTC's permits. The demands that the Consortium required of GSTC were: (a) the installation two 2-inch HDPE conduits at no cost to the municipalities; (b) the installation of one 64-count fiber-optic cable in one of the above conduits at no cost to the municipalities; (c) a commitment not to transfer, by sale or lease, any empty conduit to an entity that is required to have a municipal franchise without first verifying that such entity has obtained the pertinent franchise; (d) that GSTC provide advance notice to the individual municipalities of the proposed date and design of the installation to enable other entities with compatible uses to place their facilities in the same trench or bore on a shared or proportional cost basis; (e) agree to a five-year term so that the municipalities can reassess the companies' use of the public rights-of-way at the end of that time; and (f) grant each municipality access to the companies' facilities, e.g., switches and equipment, on an incremental cost basis.

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GSTC formally denied the Consortium's demands on June 30, 1999, stating in part that, "it is GST[C]'s position that California state law prohibits any of the municipalities from requiring any more than a permit fee which is statutorily limited to the 'reasonable costs of providing the service for which the fee is charged.'"[24] True to the Consortium's initial statements, GSTC's permits have been substantially delayed; as of this date, the County of Riverside,[25] and the Cities of Lake Elsinore,[26] Poway,[27] Escondido,[28] Norco,[29] Corona,[30] and San

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[24] Letter of June 30, 1999 from J. Jeffrey Mayhook, GSTC General Counsel, to Gerald A. Maloney, Clerk of the Board, County of Riverside, and Lori Panzino, Franchise Analyst, County of Riverside.

[25] During GSTC's initial meeting with Gerald A. Maloney, Clerk of the Board, County of Riverside, on April 28, 1999, Mr. Maloney would not allow GSTC to submit a permit application package. In a later conversation of September 9, 1999, Mr. Maloney refused to continue to process GSTC's permits due to a stop work order against WFI in Northern California until the CPUC contacted him directly to inform him that that stop work order did not apply to GSTC. In a conversation on September 27, 1999, between GSTC attorney Theodore Gilliam and Mojahed S. Salama, Permit Engineer, County of Riverside, Transportation Department, Mr. Salama stated that his office had been instructed by Mr. Maloney not to process GSTC's permits until he was notified otherwise by Mr. Maloney. Although GSTC has diligently attempted to contact Mr. Maloney, Mr. Maloney has not returned GSTC's calls for over a month after the September 9, 1999, conversation.

[26] Mr. Ray O'Donnell, City Engineer, City of Lake Elsinore, stated in a conversation on July 13, 1999, that "GST[C] must work out the details of the franchise agreement," and that his office would take no further action regarding GSTC's permits until the city attorney "gave him the green light." Subsequently, it took Steve Miles, attorney for Lake Elsinore, nearly a month to return GSTC's calls, after which he demanded copies of executed "encroachment agreements" between GSTC and other municipalities for review. After supplying the requested information the day of the request, it took Mr. Miles another 23 days to return GSTC's phone calls. This is the typical response GSTC has received from the Consortium members.

[27] Patrick Foley, Senior Management Analyst, Community Services Department, City of Poway, during a June 14, 1999, telephone conversation with Michael R. Moore, Interconnection Counsel for GSTC, and Theodore Gilliam, Staff Attorney for GSTC, stated that GSTC's permits would not be processed until each company (GSTC, LVL3, and WFI) supplied the City with: (1)

Diego[31] have yet to issue GSTC permits.[32] Although number of jurisdictions have finally issued permits to GSTC, this was accomplished only after much delay, confrontation and, ultimately, threats of litigation. The Consortium's actions against GSTC have caused substantial delay and egregious harm.[33] GSTC's decision to stand its ground in accordance with its rights under both state and federal law, against what appears to be nothing less than extortion on the part of the

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a complete "Rights-of-Way Users Questionnaire; (2) signed a statement agreeing to comply with City of Poway's land use and planning process (including public notification) for any structures or facilities to be placed in or adjacent to the City's public rights-of way and provide information to conduct applicable California Environmental Quality Act (CEQA review); (3) a copy of their CPCN, as well as all CPUC filings and mitigation measures; and (4) copies of its certification from the CPUC (the City apparently did not understand that CPCN and certification were one in the same). Mr. Foley also expressed in the meeting of June 18, 1999, that any company that "did not adhere to the requirements of Poway" would "not want to see what was waiting for them in Poway."

[28] Although the City has yet to issue GSTC's its permits, it has expressed an interest in doing so if GSTC agrees to provide conduit to the City at incremental cost. ("Incremental cost" is the cost that GSTC pays or incurs for the work performed.)

[30] The City permitting office has informed GSTC that no permits will be issued prior to GSTC agreeing to a list of conditions; however, the city attorney's office has not returned GSTC's calls regarding issuance of the list for over a month, despite numerous attempts by GSTC to contact the attorney.

[31] The City of San Diego has been working with GSTC to arrive at acceptable language for an encroachment agreement. Among the terms that the City is requesting that GSTC adhere to are a bond two and half times the amount of proposed construction, GSTC to indemnify the City for the City's own negligence, and waiver of GSTC's statutory right to neutral venue.

[32]GSTC's permits were submitted approximately May 11, 1999. GSTC has yet to receive its permits, nor is it known when GSTC will receive its permits.

[33]GSTC has incurred substantial harm through contractual penalties as a result of the construction delay, has lost revenue anticipated by completion of the build, and has sustained irreparable damage to its reputation as a capable and dependable telecommunications company.

Consortium, has cost GSTC a great deal of time, money, effort, and probably even market share. The simple truth of the matter is that the Consortium's members are not satisfied with the restrictions placed upon them by state[34] and federal law,[35] and they are improperly seeking to exert leverage on GSTC, by their concerted refusal to issue permits, in order to extract unauthorized compensation from GSTC.[36]

III APPLICABLE LAW

Under California law GSTC is clearly authorized to install telecommunications lines within public rights-of-way subject only to time, manner and place regulations and without the payment of permit or other fees that are revenue generating levies. Public Utilities Code § 7901[37]

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[34] Carriers such as GSTC have been granted by the State legislature a statewide right to use public rights-of-way under §7901, California Public Utilities Code (1999). *See* note 37 *infra*.

[35] 47 U.S.C. §253(c) (1999) Although federal law does not prohibit municipalities from assessing fees in a nondiscriminatory neutral manner, they may only do so to the extent that state law allows. California law provides that municipalities may only charge fees proportionate to the administrative costs allowed.

[36] In a May 12, 1999, letter to Tim Taylor of GSTC, San Bernadino County Franchise Analyst Lori D. Panzino stated "The consortium formation was proposed to address the divide-and-conquer attitude of telecommunications companies hiding behind the veil of California Public Utilities Code 7901." She also wrote that "The goal of the consortium is specifically to ensure that GST and other telecommunication companies are dealt with in a fair, reasonable and nondiscriminatory manner *and to protect the public's property from being utilized for private profit without the public being remunerated for its use."* (emphasis added)

[37] Section 7901. Construction of lines: Telegraph or telephone companies may construct lines of telegraph or telephone lines along and upon any public road or highway, along or across any of the waters or lands within this State, and may erect poles, posts, piers, or abutments for supporting the insulators, wires, and other necessary fixtures of their lines, in such manner and at such points as not to incommode the public use of the road or highway or interrupt the navigation of the waters.

expressly grants telephone corporations such as GST a statewide right to "construct lines of telegraph or telephone lines along and upon any public road or highway." And § 7901.1 clarifies that, while the foregoing grant of authority is subject to the right of municipalities "to exercise reasonable control as to the time, place and manner" of use, such control must be exercised in a nondiscriminatory manner and shall not be interpreted to change any existing authority regarding imposition of fees.[38] Section 7901 has consistently been interpreted by the California Attorney General,[39] the California courts[40] and the Public Utilities Commission Counsel[41] as prohibiting the imposition of revenue generating fees for the use of public rights-of-way by telecommunications companies. In order to remove any doubt about the issue, the Legislature

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[38] Section 7901.1. Municipalities; legislative intent; control of access to roads and waterways; fees:

(a) It is the intent of the Legislature, consistent with Section 7901, that municipalities shall have the right to exercise reasonable control as to the time, place and manner in which roads, highways, and waterways are accessed.

(b) The control, to be reasonable, shall, at a minimum, be applied to all entities in an equivalent manner.

(c) Nothing in this section shall add to or subtract from any existing authority with respect to the imposition of fees by municipalities.

[39] *See* 22 Ops. Atty. Gen. 1 (1953) and 28 Ops. Atty. Gen. 215 (1956).

[40] *See Pacific Tel & Tel. Co. v. City and County of San Francisco*, (App. 1 Dist. 1961) 17 Cal. Rptr. 687, 197 Cal. App.2d 133.

[41] In a June 15, 1994 letter to the San Diego City Attorney relating to a dispute over a proposed MCI installation, Public Utilities Counsel Dale Holzschuh expressed his opinion that Section 7901 authorizes certificated carriers such as MCI to install facilities along public streets and that, "[a]s a result, cities may not exclude telephone lines from the streets or require telephone companies to receive municipal franchises as a condition of using municipal rights-of-way."

added Section 50030 to the California Government Code.[42] The brazen demand of the Regional Telecommunications Consortium that GSTC provide its members with free telecommunications facilities having tremendous potential transmission capacity and value is a blatant violation of Sections 7901 and 50030.

The Consortium has attempted to justify its actions by raising several phantom issues regarding the applicability of Section 7901 to the GSTC project. First, it has been suggested by the Consortium[43] that Section 7901 was only intended to apply to the installation of lines for "plain old telephone service." The error of this position is evident from a reading of relevant California decisions[44] as well as the statement of legislative findings that accompanies Section 50030.[45]

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[42] California Government Code, Section 50030 (1999). California telecommunications infrastructure development act; permit fee restrictions:

> Any permit fee imposed by a city, including a chartered county, a county, or a city and county, for the placement, installation, repair, or upgrading of telecommunications facilities such as lines, poles, or antennas by a telephone corporation that has obtained all required authorizations to provide telecommunications services from the Public Utilities Commission and the Federal Communications Commission, shall not exceed the reasonable costs of providing the service for which the fee is being charged and shall not be levied for general revenue purposes.

[43] In a letter dated June 1, 1999 to J. Jeffrey Mayhook of GSTC, Deputy City Attorney Steven J. Nelson of the City of Escondido asserted that "it is unclear whether Section 7901 . . . would apply . . . . The conduit installation and the services GST is proposing does not appear to be for the purpose of providing local telephony to all residents and businesses of our City, regardless of income." In a letter dated May 12, 1999 to Tim Taylor of GSTC, Gerald A. Maloney, Clerk of the Board of Supervisors, Riverside County, stated that certain services, such as "voice, video, INTERNET, and data services . . . would not be viewed as traditional 'telephone' services as envisioned under P.U.C. 7901."

[44] Decisions of California courts indicate that "telephone lines" as used in Section 7901

Second, the Consortium has taken the position that GSTC is proposing to install too many conduits, and that it is not proper for a carrier to install spare conduits that may be used in the future. This ignores several important facts. Each carrier must have a spare conduit for use in repair and restoration. Also, it is a common and beneficial practice to install a number of extra conduits while the carrier is incurring the engineering and construction expense of the installation project. Given the mandate of the federal Telecommunications Act that carriers

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was intended to encompass more than mere voice communications, and that the statutory intent was that the meaning of "telephone lines" would evolve with technology. *See Pacific Telephone and Telegraph Co. v. City of Los Angeles*, 44 Cal.2d 272, 282 P.2d 36 (1955); *Commercial Communications, Inc. v. Public Utilities Commission of the State of California*, 50 Cal.2d 5112, 27 P.2d 513 (1958); *Pacific Telephone and Telegraph Co. v. City and County of San Francisco*, 197 Cal.App.2d 133, 17 Cal.Rptr. 687 (1961).

[45] Section 2 of Stats. 1996, c. 300 (S.B.1896) provides: "Sec. 2. (a) The Legislature finds and declares as follows:

"(1) Connecting all California homes and businesses to the information superhighway has the potential to position the state on the leading edge of the telecommunications revolution. The emerging technologies will encourage economic growth and provide social benefits to all Californians, as well as allow California businesses and residents to compete in national and international markets."

"(2) Congress and the Legislature of the State of California have enacted telecommunications policies that include provisions to encourage the development and deployment of new technologies, and the equitable provision of services in a way that efficiently meets consumer need and encourages the ubiquitous availability of a wide choice of state-of-the-art services, and to promote economic growth, job creation, and the substantial social benefits that will result from the rapid implementation of advanced information and communications technologies."

"(3) New technologies require investment and expansion of telecommunications networks in order to bring greater choice to consumers by encouraging universally available telecommunications service."

"(b) The Legislature further finds and declares that this act does not constitute a change in existing law."

make surplus facilities available to each other,[46] this practice will result in fewer disruptions of the public rights-of-way. But most importantly, Section 7901 does not restrict the ability of telephone companies to install conduits for future use, and a review of the facilities of the incumbent local exchange companies within the Consortium territories would reveal that the Consortium members have routinely permitted the ILEC to install conduits for future use.

Third, the Consortium has advanced the argument that GSTC should not be permitted to construct its project because a number of the conduits are being built for two other carriers, both of which are organized as limited liability companies, which are not intended to receive the benefit of Section 7901. But even a cursory reading of the relevant statutes demonstrates that this attempt to elevate form over substance is incorrect. Section 7901 refers to "telephone companies", and a limited liability company certainly is a "company". And while Section 50030 refers to fees levied upon a "telephone corporation", the definitions in other sections of the California Public Utilities Code indicate that a limited liability company is a telephone corporation for purposes of the Code.[47] Thus it is apparent that these justifications for refusing to issue permits to GSTC are merely camouflage for a concerted effort to subject new market entrants to significant compensation requirements not imposed upon the incumbents. That this

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[46] 47 U.S.C. §251(b)(4).

[47] Section 234 of the Public Utilities Code defines "telephone corporation" as including "every corporation or person owning, controlling, operating or managing any telephone line for compensation". Section 204 of the same code defines "corporation" as including "a corporation, a company, an association, and a joint stock association." And Section 205 defines "person" to include "an individual, a firm, and a copartnership". Thus a limited liability company, being a company, would be defined as a "corporation" under Section 234 and also would be defined as a "person" by virtue of being a "firm".

can happen even in a State with apparently clear laws restricting the powers of local jurisdictions is an indication that action should be taken at the national level to ensure that new market entrants are able to devote their resources to competing with other carriers rather than defending themselves from extortion.

IV. RECOMMENDED ACTION

In addition to being a violation of California law, the actions of the Consortium described above also constitute a barrier to entry in violation of Section 253 of the Telecommunications Act of 1996[48]. While federal district courts in several circuits have issued decisions[49] delineating the permitted scope of local actions under Section 253, proceeding decision by decision is a time consuming and expensive process that further delays the onset of the vibrant market competition envisioned by the 1996 Act. The Commission should issue regulations defining more precisely the permissible scope of local government action that would constitute a lawful police power regulation of the time, manner and place for physical occupation of public rights-of-way.[50] Information that is required to be provided by the carrier should be confined to technical information concerning the facilities to be placed in the public rights-of-way that is necessary to

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[48] 47 U.S.C. §253.

[49] *Bell Atlantic-Maryland, Inc. v. Prince George's County,* 1999 WL 343646 (D. Md. May 24, 1999); *AT&T Communications of the Southwest, Inc. v. City of Dallas,* 8 F. Supp.2d 582 (N.D. Tex. 1998); *BellSouth Telecommunications, Inc. v City of Coral Springs,* 1999 WL 149769 (S.D. Fla. Jan 25, 1999).

[50] *In re TCI Cablevision of Oakland County, Inc.*, 12 F.C.C.R. 21396 (F.C.C. 1997) at ¶ 103, cited with approval in *City of Coral Springs,* 1999 WL 149769 at 2 and in *City of Dallas,* 8 F.Supp.2d at 591-92.

evaluate and regulate such physical installation. Such information should not include information pertaining to the carrier's operations in other jurisdictions, customer identifications, business plans, financial statements and other information that would only be required if the municipality were to engage in the forbidden "third level" of regulatory activity, encroaching on subjects reserved to the authority of the Federal Communications Commission or the relevant State commission.

Such new regulations should also restrict the imposition of usage fees so that the compensation framework selected by the jurisdiction does not inherently favor the ILEC and act as a disincentive for the CLEC to enter the market. The amount of compensation paid by each carrier, including the ILEC, should be proportional to the amount of right-of-way occupied by it and should be limited to the costs incurred by the jurisdiction as a result of the installation and ongoing presence of that carrier's facilities. The compensation structure for each jurisdiction should be established to yield an aggregate amount of money from all carriers that is sufficient for the jurisdiction only to obtain reimbursement for its costs incurred to perform its police power functions—to issue rights-of-way permits, to inspect new construction, to coordinate a carrier's construction with the facilities of other utilities, and to perform any increased or accelerated maintenance or repair work necessitated by the placement or maintenance of the carriers' facilities in the rights-of-way. Compensation for use of rights-of-way "may not serve as general revenue-raising measures".[51]

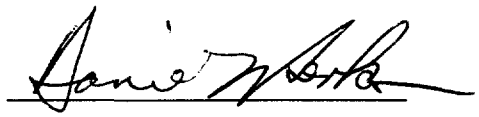
[51] *Prince George's County*, 1999 WL343646 at 35 (D. Md. May 24, 1999).

Finally, the regulations should require that each jurisdiction have a streamlined procedure to process carrier requests to use public rights-of-way, which procedure would require prompt processing of all requests. A time consuming procedure with multiple public hearings and extensive applicant informational disclosures may have been appropriate in years past to the granting of exclusive utility franchises, but that protracted process itself constitutes a barrier to entry for competitive carriers that is unnecessary in the modern telecommunications market. In that same vein, any violations of the regulations should be addressable by the FCC through an expedited hearing and decision making process.

The communities identified in Section 1 of these Comments are abusing their police powers in order to extract compensation from CLECs in violation of state and federal laws. These discriminatory actions that favor the incumbent provider clearly constitute a barrier to market entry prohibited by Section 253 of the 1996 Act and the Commission should take swift and strong action to ensure that these illegal practices cease throughout the rest of the country as well as in California.

Respectfully submitted,

GST Telecom California, Inc.

By: 

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was hand delivered this 12th day of October, 1999, to the following:

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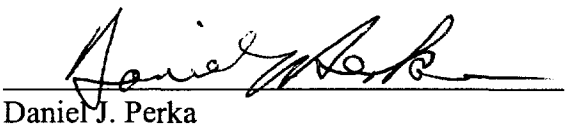

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